

FOREST SERVICE, U.S. DEPARTMENT OF AGRICULTURE
(HEIRS OF NELLIE ARAGON LINDOFF)

IBLA 94-588

Decided March 20, 1998

Appeal from a Decision of the Alaska State Office, Bureau of Land Management, approving Native allotment application AA-8005.

Affirmed.

1. Alaska: Native Allotments--Alaska National Interest Lands Conservation Act: Native Allotments--Evidence: Generally

Approval of a Native allotment application is properly affirmed where the applicant used the lands as an independent citizen during marriage to the exclusion of strangers outside the immediate family prior to the withdrawal of lands for inclusion in the Tongass National Forest.

APPEARANCES: Maria C. Lisowski, Esq., Office of the General Counsel, U.S. Department of Agriculture, Juneau, Alaska, for the U.S. Forest Service; Carlene Faithful, Esq., Office of the Regional Solicitor, U.S. Department of the Interior, Anchorage, Alaska, for the Bureau of Land Management.

OPINION BY ADMINISTRATIVE JUDGE IRWIN

The Forest Service, U.S. Department of Agriculture (FS), has appealed a May 4, 1994, Decision of the Alaska State Office, Bureau of Land Management (BLM), approving the Native allotment application of Nellie Aragon Lindoff.

On June 3, 1959, the Bureau of Indian Affairs filed a Native allotment application on behalf of Nellie Aragon. The application was filed pursuant the Act of May 17, 1906, as amended, (Native Allotment Act), 43 U.S.C. § 270-1, 270-3 (1970), and claimed use and occupancy of approximately 160 acres of land along Sinitsin Cove on Kruzov Island in secs. 26 and 35, T. 52 S., R. 60 E., Copper River Meridian, Alaska. In that application she claimed to be "head of a family" and claimed use and occupancy since "time immemorial." No evidence of use and occupancy accompanied that application. The lands identified in the application were among the lands withdrawn from entry for addition to the Tongass National Forest on

February 16, 1909, by Presidential Proclamation. 35 Stat. 2226-28 (1909); see 35 Stat. 2152 (1907).

The Juneau Land Office rejected Nellie Aragon's application on May 10, 1961, based on a report by the FS. The FS recommended rejection of Aragon's claim on the grounds she was not the head of the family and there was no sign of use or occupancy on the parcel, and because the application was in error as to the exact location of the allotment.

In 1969, Nellie Aragon Lindoff signed a second application for the same land. She again checked that she was head of a family and stated that "the land was used by my family for time immemorial." The land "was used all the time for fishing, hunting, smoke house, & dry fish," she wrote.

In May 1975, BLM wrote Lindoff requesting further information in support of her claim. The BLM noted she was born in 1889 and stated her occupancy of the land included in the Tongass National Forest in 1909 had to have been "for yourself as an independent citizen or as head of a family, and not as a minor child occupying or using the land in company with your parents."

Nellie Aragon Lindoff died in August 1976. In November 1977, her son, William Aragon, submitted an Affidavit in support of her application. He stated that as a young child he went to the land his mother was claiming as an allotment to gather food and that his mother used the land "extensively for smoking fish, gathering edible foods, and other subsistence needs." He stated that in the past his parents "had a cabin on this particular piece of land." His mother had inherited the right to use the claimed land from her uncle and grandfather under Tlingit Indian tradition, he stated. "[M]y mother was first married at around the age of 14, which was around 1903, and since that time she has been an independent adult in charge of her own affairs," he stated. When she was between 18 and 19, "in or around the year 1908, she was already married the second time." William Aragon's Affidavit concludes: "[A]ccording to what I have been told, it was soon after my mother first married, and was consequently an adult member of the community, that she actually began her regular, continuous use of the land at Sinitsin Cove." (October 10, 1977, Affidavit at 2.)

The BLM conducted a field examination on July 10, 1979, accompanied by William Aragon. The October 1979 field report states that Aragon said he accompanied his mother to this area annually to fish and hunt. "[S]igns of Sitka black-tailed deer were abundant and the Cove was alive with migrating pink salmon," the report stated. "The remains of a cabin site, resembling a compost pile, was located" as well. (Report of Field Exam at 2.) The BLM field examiner concluded that "[a]t the age of 19 and having been married twice, * * * Nellie Aragon Lindoff, could have been an independent adult or a head of a household prior to the Tongass National Forest withdrawal of February 16, 1909." The cabin remains provide evidence of occupancy potentially exclusive of others, and the potential for hunting and fishing is high, the examiner concluded. The examiner concluded the requirements of 43 C.F.R. Subpart 2561 had been complied with

and a Native allotment certificate should be issued. The examiner's report was concurred with by the BLM Area and District Managers in November 1979.

The BLM's May 4, 1994, Decision recited the information related above and stated:

[T]his office has determined that at the time the claim was initiated, the lands were vacant, unappropriated and unreserved and the applicant has satisfied the use and occupancy requirements of the Act of May 17, 1906, as amended. Therefore, Native allotment application AA-8805 is hereby approved as to the lands described above.

(Decision at 3.) The FS filed a timely notice of appeal.

"The record does not establish that the applicant used and occupied the land as an independent citizen," the FS argues. (Statement of Reasons (SOR) at 4.) The statements in William Aragon's Affidavit are not sufficient, FS argues,

because there is no indication that her use was independent of any use by her husband or that she, rather than her husband, was the head of the family. A person claiming land to the potential exclusion of others must be able to lay claim to the land to the exclusion of all others, family members and absolute strangers, [United States v. Akootchook, Brower, [123 IBLA 6 (1992)]] at 9.

Id. at 5. The FS states BLM's Decision should be set aside and the case remanded for a hearing at which the applicant may attempt to show compliance with the requirements of the Native Allotment Act and regulations. Id. at 3, 5.

In its Answer, BLM observes that we noted in Akootchook, supra, at 11, that in George v. Hodel, Case No. A86-113 Civil, (D. Alaska, Apr. 30, 1987), the U.S. District Court stated the Department's interpretation that "an allotment applicant's use and occupancy be independent and exclusive of immediate family members * * * is unreasonable and inconsistent with the terms of the Alaska Native Allotment Act and the Act's regulations." The BLM argues that Nellie Aragon's marriage at age 14 in 1903 established her as an independent adult, that she used the land independently before it was withdrawn in 1909, and that she "need not show that she used the lands to the exclusion of her husband or other members of her nuclear family." (Answer at 9-10.)

[1] The Native Allotment Act, as amended, 43 U.S.C. §§ 270-1 through 270-3 (1970), granted the Secretary of the Interior authority to allot up to 160 acres of vacant, unappropriated, and unreserved nonmineral land in Alaska to any Native Alaskan Indian, Aleut, or Eskimo, 21 years old or the head of a family, upon satisfactory proof of substantially continuous use and occupancy for a 5-year period. Departmental regulations interpret the Act as follows:

The term "substantially continuous use and occupancy" contemplates the customary seasonality of use and occupancy by the applicant of any land used by him for his livelihood and well-being and that of his family. Such use and occupancy must be substantial actual possession and use of the land, at least potentially exclusive of others, and not merely intermittent use.

43 C.F.R. § 2561.0-5(a).

A Native applicant may be granted an allotment on withdrawn land if all other requirements have been met and the applicant commenced the required use and occupancy prior to the withdrawal. United States v. Heirs of Elsie Hansen Wilson, 128 IBLA 252, 254 (1994); United States v. Estate of George D. Estabrook, 94 IBLA 38, 42 (1986), and authorities cited. In order for use and occupancy prior to a withdrawal to qualify, the applicant must use and occupy the land as an independent citizen acting on his or her own behalf or as head of a family and not as a minor child in the company of and under the supervision of one's parents. United States v. George Jim, Sr., 134 IBLA 294, 296 (1995), and cases cited.

In George A. Jim, Sr., *supra*, we stated:

The District Court overruled the Department's holding in Jimmie A. George, Sr., 60 IBLA 14 (1981), that qualifying use and occupancy must be as an independent citizen, potentially exclusive of immediate family members. * * * The applicant in George was over 19 years old at the time of the withdrawal and was considered to [be] an adult under Tlingit law at that time, which set the age of majority at 12. Jimmie A. George, Sr., 60 IBLA at 14-17.

134 IBLA at 297. In George, the U.S. District Court ruled that "[e]xclusive of others is met by exclusivity with regard to strangers outside the immediate nuclear family unit." See Ex. A, BLM Answer, Transcript of Mar. 26, 1987, Oral Arguments at 29. In Forest Service, United States Department of Agriculture (Heirs of Frank Kitka), 133 IBLA 219 (1995), following George, we found the record of use and occupancy by Frank Kitka, born in 1889, of lands reserved from entry in 1902, was sufficient to support BLM's finding that the requirements of the Native Allotment Act were met. In this case, too, we find the record supports BLM's Decision. William Aragon's Affidavit that his mother was married at about the age of 14 in 1903 and thereafter used the land before it was withdrawn in 1909 establishes her independent use of it. Cf. United States v. Annie Bennett, 92 IBLA 174, 178 (1986). ^{1/}

^{1/} "We agree that appellant's testimony that she used the land as a 'young girl,' (Tr. 65), could mean, based upon Tlingit standards of maturity, that such use commenced prior to the 1909 withdrawal." Annie Bennett was born in 1897 and was almost 12 years old when the land she applied for was withdrawn in 1909. 92 IBLA at 175, n.3.

Therefore, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 C.F.R. § 4.1, the Decision appealed from is affirmed.

Will A. Irwin
Administrative Judge

I concur:

Franklin D. Amess
Administrative Judge

